Supreme Court, U.S.
FILED

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No. 08-

IN THE

Supreme Court of the United States

MARSHALL J. KATZ,

Petitioner,

v.

DONALD C. WINTER,
Secretary United States Navy,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RALPH B. PINSKEY
LAW OFFICES OF
RALPH B. PINSKEY
2414 Logan Street
Harrisburg, PA 17110
(717) 576-7383

Attorney for Petitioner

222818

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether exhaustion of administrative remedies should be waived with respect to Petitioner's religious discrimination claim where:

a.) During administrative proceedings before the EEOC Petitioner served Requests for Production of Documents on the Respondent for production of "all official and unofficial files kept on [Petitioner] by any civilian or military employee of the Navy other than [his] official personnel file, his official medical file, and his official security file"; and

b.) The term "file" was clearly defined as "any paper file, or information stored in a computer, or on a floppy disk, CD, or any other device used to store documents"; and

c.) Respondent stated in response to that request that it was not aware of any "unofficial" files that were being kept on Petitioner; and

d.) As a result of that response, and because discovery received by Petitioner during the EEOC proceedings did not support a claim for religious discrimination; that claim of religious discrimination was abandoned by Petitioner before the EEOC; and

e.) Subsequently, during the District Court proceedings, Respondent's Executive Officer admitted during his oral deposition to once having a computer file on Petitioner; which he said that he deleted after the EEOC proceedings were over, at the time when he left the Command; and

f.) The Executive Officer's admission as to previously having a computer file on Petitioner led to the eventual production of hundreds of e-mails from Respondent's back-up tapes; and

g.) The documents from the Respondent's back-up tapes create a genuine issue of material fact as to whether adverse employment actions taken against Petitioner were improperly influenced by the religious bias of one of Petitioner's subordinates toward Petitioner; and

h.) Petitioner would not have abandoned his religious discrimination claim before the EEOC, if he had received all of those documents from the back-up tapes during discovery in the EEOC proceedings.

LIST OF PARTIES

The parties to this proceeding are Petitioner Marshall J. Katz, who was known in the proceedings before the District Court as "John Doe" and Donald C. Winter, Secretary of the Navy.

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IN THE SUPREME COURT OF THE UNITED STATES — PETITION FOR A WRIT OF CERTIORARI

Petitioner Marshall J. Katz respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit on December 17, 2008. On February 17, 2009 said Court of Appeals denied Petitioner's Sur Petition for Panel Rehearing with Suggestion for Rehearing En Banc.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit dated December 17, 2008, affirming the decision of the District Court to grant Summary Judgment to Respondent, has not been reported. It is reproduced in Appendix "A" hereto.

The Order of the District Court dated June 20, 2007, denying Petitioner's Motion for Reconsideration of Summary Judgment has not been reported. It is reproduced in Appendix "B" hereto.

The Memorandum Opinion of the District Court dated April 5, 2007, in support of its Order granting Respondent's Motion for Summary Judgment, has not been reported. It is reproduced in Appendix "D" hereto.

The Order of the Court of Appeals for the Third Circuit dated February 17, 2009, denying both panel rehearing and rehearing en banc, has not been reported. It is reproduced in Exhibit "E" hereto.

STATEMENT OF BASIS OF JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 (1). The Order of the Court of Appeals for the Third Circuit, affirming the decision of the District Court to grant Summary Judgment to Respondent, was entered on December 17, 2008. The Order of the Court of Appeals denying rehearing was entered on February 17, 2009.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

29 C.F.R. § 1614.109(d)

"d) *Discovery.* The administrative judge shall notify the parties of the right to seek discovery prior to hearing and may issue such discovery orders as are appropriate. * * * * Both parties are entitled to reasonable development of evidence on matters raised in the complaint, but the administrative judge may limit the quantity and timing of discovery. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations, or production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overburdensome, repetitious, or privileged."

STATEMENT OF THE CASE

This is a federal employment discrimination case. The Petitioner is Marshall J. Katz (hereinafter sometimes called "Katz" or "Petitioner".) The Respondent is Donald C. Winter, Secretary of the Navy (hereinafter sometimes called "the Navy" or "Respondent".) During the District Court proceedings Katz was known as "John Doe." However, in the EEOC proceedings Katz was known by his proper name.

Back in the late 1980's Katz, a civilian supervisory employee of the Navy, was sexually assaulted by a Navy Captain, who was his immediate supervisor. When Katz "opposed" this sexual harassment by reporting it to Naval authorities, the Navy purported to remove his security clearance[1] and tried to fire him from his supervisory position. Katz fought his removal by filing an EEO Complaint.

The result of that first EEO Complaint was a settlement whereby Katz got to keep his federal employment with the Navy, but he accepted a demotion to a non- supervisory position.

Sometime later, Katz's "eligibility" for a security clearance was restored, but for years Katz had problems getting back into supervision (which problems he believed were related to his reporting of the sexual assault by the Navy Captain.) Therefore, he filed a

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[1] The Navy now concedes that Katz did not have a security clearance at that time. The clearance earlier had been administratively withdrawn without prejudice.

second EEO Complaint with the Navy, and while that second Complaint was pending, he was offered a supervisory position, which he accepted.

Subsequently, around late 2000, certain civilian Navy employees, including an individual by the name of Ron Sivak ("Sivak") were transferred from another operation to Katz's supervision. These employees were not happy with the transfer and through their Union filed an unfair labor practice charge against the Navy (which had nothing to do with Katz). However, when that tactic failed, they began to complain about Katz, trying to either get Katz removed as their supervisor or to remove themselves from Katz's supervision.

These disgruntled employees filed Union grievances against Katz; they filed an EEO Complaint against him; they made complaints of potential workplace violence. Also during this time period anonymous hotline complaints were received by the Navy about Katz.

Captain James Naber (Respondent's former Executive Officer) testified in his deposition that he does not recall the exact sequence of complaints; but, "It appeared to be an escalating series of complaints, generally reiterating the same complaints. . ."

Leonard Faerber (Katz's Deputy Department head and second level supervisor) was asked during his oral deposition what was the problem with these employees. Faerber replied that they were just "belligerent non-performers" who had been essentially unsupervised for many years.

In his deposition Captain Naber acknowledged that one of the remedies that the Union sought with all of their complaints was that Katz be removed as a supervisor. However, he admitted that there is no evidence that any of these complaints had validity. Naber said that, basically, these people were, for the most part, unhappy with Katz's "management style."

The Navy used an alleged investigation into the hotline complaints as a pretext to remove Katz's access to classified information and to transfer him to a non-supervisory position, where he remained until the day he retired.

Katz's administrative complaint of discrimination raised age (over 40), religion, (Jewish) and retaliation for prior protected activity. During those EEOC proceedings, Katz served Requests for Production of Documents on the Navy that asked the Navy to produce "all official and unofficial files kept on Mr. Katz by any civilian or military employee of the Navy other than [his] official personnel file, his official medical file, and his official security file." Katz was very clear in defining a "file" as "any paper file, or information stored in a computer, or on a floppy disk, CD, or any other device used to store documents." The reason for requesting those files is obvious. If there were any evidence that might suggest the Navy's real motive for removing Katz's access to classified information and for transferring him to a non-supervisory position, that evidence would most likely be found in those private files.

The Navy objected to that document request on the grounds that it was "overbroad, burdensome and

harassing". If that were all that the Navy did, there would have been no problem here because Katz could have asked the EEOC Judge to make a ruling on the Navy's objection. But the Navy deceived Katz when it added to its response, "without waiving any objections, the agency is not aware of any 'unofficial' files that are being kept on Mr. Katz." As a practical matter, one would not be expected to ask a Judge to make a ruling on an objection to the production of documents where opposing counsel has specifically answered that he is not aware that such files exist.

Because the discovery that Katz received in the EEOC proceedings did not support religious discrimination, and because the applicable Pennsylvania Rule of Professional Conduct prohibits asserting issues unless there is a basis for doing so that is not frivolous[2], Katz's Counsel felt compelled to abandon the religious discrimination claims before the EEOC. When Katz filed his civil action in the District Court, it did not include a claim for religious discrimination. However, during the taking of Captain Naber's oral deposition, Captain Naber admitted to once having a private computer file on Katz that he deleted after the EEOC hearing, when he left the Command.

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[2] Rule 3.1 of the Pennsylvania Rules of Professional Conduct, which was in effect during the EEOC proceedings, states in pertinent part:

> " A lawyer shall not bring or defend a proceeding, *or assert of controvert an issue*, unless there is a basis for doing so that is not frivolous . . . * * * *" (emphasis added)

Captain Naber's admission of previously having a computer file on Katz ultimately led to the production of hundreds of emails from the Navy's backup tapes. Those emails were then compiled together by Katz and were filed in the District Court in opposition to Summary Judgment, where they were known as Katz's "Supplemental Record." Following receipt of these emails, Katz unsuccessfully attempted to revive the religious discrimination claim that he abandoned before the EEOC.

It is quite clear from reading Katz's "Supplement Record" that the Navy's decision to remove Katz's access to classified information and to transfer him to a non-supervisory position was improperly influenced by the bias of Ron Sivak toward his Jewish supervisor, Marshall Katz.

In an e-mail dated July 7, 2001 from Gerald Linnen (Human Resources) to CDR Paul Nichols, Leonard Faerber, Wayne Coyne and others he wrote:

> "In my opinion, there's a good chance that whoever investigates these charges will not find a hostile work environment. (*In fact, only thing that I've heard is Sivak having a Nazi like sign by his desk.*)" (emphasis added)

On October 19, 2001, in his response to the first step formal group grievance of Ron Sivak, David Brunner and David Kramer, CDR Paul Nichols stated:

> "In general, I agree with Mr. Coyne's assessment of the situation - that there is

> currently an air of open hostility toward the supervisor Marshall Katz. . ."

In his e-mail of November 21, 2001 to Captain Naber and others, Richard Grubbs wrote:

> "I am told that Mr. Sivak has been routinely failing to follow supervisory directions."

Lt. Jeff Corliss states in an e-mail that he sent to Capt. Naber on November 27, 2001 that he was an observer in a meeting called by Marshall Katz to address Mr. Sivak's work. Lt. Corliss related to Capt. Naber that during that meeting Mr. Sivak was "sarcastic," "confrontational," and "insulting." Lt. Corliss further states:

> "In my opinion as an observer Mr. Katz did not raise his voice, show any temper, use profane language and was professional throughout the course of the meeting. However, the same cannot be said for Mr. Sivak."

On November 30, 2001 Captain Naber sent an e-mail to Command Investigator Craig Hinkle in which Capt. Naber stated:

> "Craig: I understand that Ron Sivak has been in touch with you and is worried about one of the managers Katz going postal. After having a meeting with Mr. Sivak and his Union representatives *I am more concerned with Mr. Sivak going postal.* Did you in fact spend

> any time in Mr. Sivak's work area? What is your assessment of the environment? I would be interested in discussing this issue with you at your earliest convenience on Monday." (emphasis added)

On December 18, 2001, in response to the third step formal group grievance, Captain Naber wrote:

> "It is clear to me that the grievants have also contributed to the tensions in the branch through their own words, deeds, or lack of action when directed to perform legitimate work related functions. *I am especially distressed at Mr. Sivak's posting of the German words 'Arbeit Macht Frei' in the area of his desk. These were the words inscribed on gates of one of the Nazi concentration camps and were clearly meant to irritate Mr. Katz who is Jewish. References to Code 94 being a 'Warsaw Ghetto' during a ULP meeting adds to the perception that anti-Semitism is laced into the antagonism felt by Mr. Sivak toward Mr. Katz."* (emphasis added)

Drafts of this response to the third step formal group grievance, containing the exact above quoted language, were sent by e-mail by Captain Naber to Richard Grubbs, Ruth Sanders, and Captain Roesner.

On May 13, 2002, in an email that Leonard Faerber wrote to Gerald Linnen and Wayne Coyne, Mr. Faerber states:

> "If [Craig Hinkle's] investigation [of a complaint that Marshall Katz may have a gun] doesn't turn up something tangible, then I will be looking at my options in terms of disciplinary action against the accusers . . . *I feel it is Katz who needs relief from a steady stream of slanderous and harassing comments of some of his ex-employees . . . We may need to take a closer look to see if this harassment is racially*[3] *based.* If I am invited to the LMPC meeting, that will be the tone of my message." (emphasis added)

On May 16, 2002 Command Investigator Craig Hinkle completed his investigation finding that the allegation that Marshall Katz "may have a gun" is unfounded. (To our Knowledge there was no investigation conducted whether the complaints of Ron Sivak or the other disgruntled employees were motivated by Mr. Katz's religion.)

On November 13, 2002 Leonard Faerber sent an email to CDR Nichols stating:

> "Marshall Katz has apparently been pushing for an investigation of Sivak related to

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[3] Because Marshall Katz is Caucasian, we believe that Leonard Faerber used the term "racially" as referring to Jews as being a race.

> potential for violence in the workplace . . . don't think that one will go very far . . . bargaining members can initiate such things against supervisors, but apparently not vice versa."

"Pay a visit when you get a chance . . . gets wilder every day."

Petitioner Katz is not accusing his Management of being biased against him because he is Jewish. However, under the case law of the Third Circuit, a claim of discrimination is sufficient if those exhibiting discriminatory animus *influenced or participated* in the decision. *Abramson v. William Patterson College of New Jersey,* 260 F.3d 265, 285-86 (3rd Cir. 2001); *Shesko v. City Coatesville*, 324 F.Supp.2d 643, 650-51 (E.D. Pa. 2004); *Vantassel v. Brooks,* 355 F.Supp.2d 788, 800 (W.D. Pa. 2005); *See also Russell v. McKinney Hospital Venture,* 235 F.3d 219, 226, 227 (5th Cir. 2000), which is cited with approval by the Third Circuit in the *Abramson* decision. 260 F.3d at 286 *Russell* holds that if the employee can demonstrate that others had influence or leverage over the official decision maker, it is proper to impute their discriminatory attitudes to the decision maker. 235 F.3d at 226.

Here, based on Katz's "Supplemental Record", a reasonable Jury could reasonably find that Ron Sivak was driving force behind all of the complaints that were being made to the Navy against Katz. A reasonable Jury could reasonably find that Sivak was motivated to bring those complaints because he did not want to work for a Jewish supervisor. Captain Naber even admitted that

Sivak posted the words "Arbeit Macht Frei" in the area of his desk to irritate Katz, whom Capt. Naber knew was Jewish. Captain Naber also stated that when Sivak referred to Code 94 as being a "Warsaw Ghetto" during a ULP meeting, this only added to the perception that anti-Semitism is laced into the antagonism felt by Mr. Sivak toward Katz.

True, it was Captain Roesner (the Commanding Officer) who was the ultimate decision-maker to remove Katz's access to classified information and to transfer him to a non- supervisory position; however, a reasonable jury could reasonably find that when Ron Sivak threatened to bring his complaint to the attention of the "highest authority" that was just enough "leverage" on the Navy to cause Katz's employer to give in to Sivak's demands.

At page 12 of her Memorandum Decision of April 5, 2007 the District Judge found that some of the evidence presented to the Court is "troubling, especially with regard to the behaviors of Katz's co-workers."

Mr. Katz can assure this Honorable Court that if he had not been deceived during discovery in the EEOC proceedings about the existence of private computer files, and if the documents contained in Katz's "Supplemental Record" had been produced during that administrative discovery; he would have never abandoned his religious discrimination claim before the EEOC.

REASONS FOR GRANTING THE PETITION

This is an important case of first impression. A federal employee who seeks to litigate a Title VII claim of discrimination in federal court is required to have exhausted administrative remedies relating to that claim. *Brown v. General Services Administration*, 425 U.S. 820, 833, 96 S. Ct. 1961, 1968, 48 L. Ed. 2d 402 (1976)

The purpose of exhaustion is to give the agency the information it needs to investigate and resolve the dispute between the employee and employer. Good faith effort by the employee to cooperate with the agency and the EEOC and to provide all relevant, available information is all that exhaustion requires. *Wade v. Secretary of the Army*, 796 F.2d 1369, 1377 (11th Cir. 1986); *Munoz v. Aldridge*, 894 F.2d 1489, 1493 (5th Cir. 1990); *LaPorte v. Henderson*, 176 F. Supp. 2d 464, 468 (D. Md. 2001)

As noted in *Wade v. Secretary of the Army*, 796 F.2d at *Id.*, the agency will often be more likely to have access to relevant information and may be required to provide information that is at its disposal and not available to a complaining employee.

Wade holds that *"[i]f the employee is hampered by the actions of the agency or complaints examiner or by the unavailability of any discovery procedures, he or she should not be deemed thereby to have failed to comply with exhaustion requirements."* *Id.* (emphasis added)

Here, Mr. Katz was hampered by the actions of the Respondent when Respondent's attorney, during the EEOC proceedings, responded to a request for production of documents that the agency was not aware of the existence of any "unofficial", private files on Katz. That response was definitely not true because Captain Naber testified during his oral deposition that he had a computer file on Katz, which he deleted after Katz lost his case before the EEOC.

This Court must grant a Writ of Certiorari to Mr. Katz:

1. Mr. Katz was deprived of "his day in Court" on his religious discrimination claim through no fault of his own or his attorney. He and his attorney did the responsible thing of abandoning the religious discrimination before the EEOC because all of the evidence that was produced to that point in time did not support a claim of religious discrimination.

2. Something must be done by the judicial system to discourage federal employers from providing false or misleading responses during administrative discovery. Because of the requirement of exhaustion of administrative remedies, there is an inter-relationship between administrative discovery and judicial discovery. Not all federal employees can afford private counsel. Therefore, they may not be able to take their case beyond the EEOC. If the agency lies or is deceptive about the existence of relevant evidence, that person may never know that he or she has been cheated out of evidence that might have supported their EEO claim.

Mr. Katz was able to afford private counsel. And because of that, he was able to learn during the taking of oral depositions in the District Court proceeding that Respondent lied or was, at least, misleading when it responded to administrative discovery that it was unaware of any unofficial "files" on Katz. Mr. Katz was even given the contents of Captain Naber's "files" from the backup tapes. But the District Court, in effect, would not let Mr. Katz use those contents because, as far as the District Court was concerned, Mr. Katz had abandoned his religious discrimination claim before the EEOC (at a time when he was denied use of those documents.)

3. Mr. Katz has no other recourse but this Supreme Court. If Respondent's lie or deceptive response had been discovered while this case was still pending before the EEOC, Katz might have been able to obtain appropriate relief from that administrative body. See 29 C.F.R. § 1614.109(d) ("Upon appointment the administrative judge shall assume full responsibility for the adjudication of the complaint, including overseeing the development of the record."); *See also Fong v. United State Department of the Treasury*, 705 F. Supp. 41, 47-48 (D.D.C. 1989) (suggesting that the Merit Systems Protection Board could be required to impose sanctions on a federal employer for falsely answering interrogatories, if the response prejudiced the employee's case.) Here, Respondent's false or misleading response did prejudice Mr. Katz's case. Because the response had the effect of denying him relevant evidence about his religious discrimination claim, Mr. Katz abandoned that claim before the EEOC. But Mr. Katz did not discover that lie or deception until

well within the judicial proceedings, at the time when he was deposing Captain Naber. Mr. Katz could not then go back to the EEOC, nor should he have to go back. The EEOC lost jurisdiction of this case when Katz filed his civil action in the District Court. Therefore, because Katz did proceed in good faith before the EEOC, further exhaustion of his administrative remedies on his religious discrimination claim should be waived.

CONCLUSION

In conclusion, this Honorable Court should issue a Writ of Certiorari because it will help to remedy an injustice suffered by Mr. Katz and, by requiring all federal employers to fully comply with the requirements of administrative discovery, or else risk a waiver of the employee's requirement of exhaustion of administrative remedies, this Court will be strengthening the administrative process.

Respectfully submitted,

RALPH B. PINSKEY
LAW OFFICES OF
RALPH B. PINSKEY
2414 Logan Street
Harrisburg, PA 17110
(717) 576-7383

Attorney for Petitioner

APPENDIX

APPENDIX A —OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED DECEMBER 17, 2008

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 07-3481

MARSHALL J. KATZ,

Appellant

v.

DONALD C. WINTER, SECRETARY
UNITED STATES NAVY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. Civ. No. 1:cv-04-02170)
District Judge: Honorable Yvette Kane

Submitted Under Third Circuit L.A.R. 34.1(a)
December 1, 2008

Before: AMBRO, WEIS and VAN ANTWERPEN,
Circuit Judges.

(Opinion Filed December 17, 2008)

Appendix A

OPINION

WEIS, *Circuit Judge.*

Plaintiff, a former civilian employee of the Navy, has made various Title VII claims of employment discrimination and retaliation against the Secretary of the Navy. After pursuing administrative remedies without success, he filed suit in the United States District Court for the Middle District of Pennsylvania. After preparing a comprehensive opinion, the District Court entered summary judgment for the Secretary and denied the plaintiff's claims.

On appeal to this Court, plaintiff has asserted error as to only two of the many claims presented to the District Court. He asserts that he presented grounds sufficient to excuse his failure to exhaust his religious discrimination claims before the EEOC. He also alleges that a genuine issue of material fact exists as to whether there was a causal connection between his prior protected activity and the adverse employment actions taken against him.

In the proceedings that he brought before the EEOC, plaintiff asserted religious and age discrimination claims. However, he voluntarily abandoned those administrative claims and thus did not exhaust his ability to obtain a remedy before the EEOC. Having chosen to waive the claims during the administrative proceeding, plaintiff could not present them to the District Court. *See Francis v. Mineta*, 505

F.3d 266, 272 (3d Cir. 2007) (explaining that a plaintiff must exhaust his administrative remedies under Title VII before bringing an employment discrimination claim to the federal district courts).

Plaintiff, however, contends that he was misled by the Navy's withholding of certain discovery material involving the existence of unofficial files kept on him. The District Court heard that assertion and issued certain discovery directions to defendant. After examining the plaintiff's claims of being misled and the Secretary's response, the District Court rejected the plaintiff's contention, though it did not specifically address the issue of unofficial files in its memorandum opinion. We find no error in the District Court's decision or its proceedings in the discovery area. We also agree that plaintiff has not shown an adequate reason for waiving his administrative remedies.

Plaintiff further alleges that his prior protected activity, filing EEO complaints and reporting a sexual assault, resulted in adverse employment actions. He specifically contends that he suffered temporary suspension of access to classified materials, involuntary lateral assignment, a refusal to reinstate him to his previous position, and failure to select him for promotion.

To demonstrate a *prima facie* case of retaliation under Title VII, a plaintiff must show, among other things, that "there was a causal connection between [his] participation in [activity protected by Title VII] and [any] adverse employment action[s]." *Moore v. City of*

Philadelphia, 461 F.3d 331, 340-41 (3d Cir. 2006) (quoting *Nelson v. Upsala Coll.*, 51 F.3d 383, 386 (3d Cir. 1995)). The District Court analyzed the record and concluded that plaintiff had not presented such evidence in regard to his EEO activity. We find no error in the District Court's review of the record and conclude that plaintiff failed to demonstrate a causal connection between the alleged adverse employment actions and all of his prior allegedly protected activity.

Accordingly the judgment of the District Court will be affirmed.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED JUNE 20, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 1:04-CV-2170

(Chief Judge Kane)

JOHN DOE,

Plaintiff

v.

DONALD C. WINTER, Secretary of the United States Department of the Navy,

Defendant

ORDER

AND NOW, on this 20th day of June, 2007, upon consideration of the parties' submissions (Doc. Nos. 107-109) with respect to Plaintiff's motion for reconsideration (Doc. No. 105), and having determined that Plaintiff has not raised grounds warranting reconsideration, *see Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677-78 (3d Cir. 1999), **IT IS HEREBY ORDERED THAT** Plaintiff's motion (Doc. No. 105) is **DENIED**.

Appendix B

s/ Yvette Kane
Yvette Kane, Chief Judge
United States District Court
Middle District of Pennsylvania

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED APRIL 5, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 1:04-CV-2170

(Chief Judge Kane)

JOHN DOE,

Plaintiff

v.

DONALD C. WINTER, Secretary of the United States Department of the Navy,

Defendant

ORDER

AND NOW, on this 5th day of April, 2007, for the reasons set forth in the accompanying memorandum, **IT IS HEREBY ORDERED THAT** Defendant's motion for summary judgment (Doc. No. 41) is **GRANTED. IT IS FURTHER ORDERED THAT** Plaintiff's spoliation motion is **DENIED**. (Doc. No. 39.) Plaintiff's remaining motions (Doc. Nos. 83, 97) are **DENIED** as moot. The Clerk shall enter judgment in Defendant's favor.

Appendix C

s/ Yvette Kane
Yvette Kane, Chief Judge
United States District Court
Middle District of Pennsylvania

APPENDIX D — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED APRIL 5, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 1:04-CV-2170

(Chief Judge Kane)

JOHN DOE,

Plaintiff

v.

DONALD C. WINTER, Secretary of the United States Department of the Navy,[1]

Defendant

MEMORANDUM

Before this Court are Defendant's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 (Doc. No. 41), Plaintiff's motion for default

1. Pursuant to Federal Rule of Civil Procedure 25(d)(1), the Court has substituted Defendant Winter as the successor to the previously named Defendant, Gordon R. England, Secretary of the United States Navy.

judgment or for a spoliation instruction (Doc. No. 39), Plaintiff's motion to continue using the pseudonym John Doe (Doc. No. 83), and Plaintiff's motion to re-open the record (Doc. No. 97). The parties have briefed the motions, and they are ripe for disposition. Upon consideration of the parties' arguments, a thorough review of the record, and for the reasons set forth below, the Court will grant Defendant's motion for summary judgment, and deny Plaintiff's motions as moot.

I. BACKGROUND

A. Factual Background[2]

John Doe is a former Navy employee. In 2001, he

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2. Local Rule 56.1 provides that a motion for summary judgment must be accompanied by "a separate, short and concise statement of the material facts, in numbered paragraphs, as to which the moving party contends there is no genuine issue to be tried." Additionally, the rule demands that an opposing party "include a separate, short and concise statement of the material facts, responding to the numbered paragraphs set forth in the statement required in the foregoing paragraph, as to which it is contended that there exists a genuine issue to be tried." *Id.* A failure to file a counter-statement equates to an admission of all of the facts set forth in the movant's statement. This Local Rule serves several purposes. First, it is designed to aid the Court in its determination of whether any genuine issue of material fact is in dispute. Second, it affixes the burden imposed by Federal Rule of Civil Procedure 56(e), as recognized in *Celotex Corp. v. Catrett*, on the nonmoving party "to go beyond the pleadings

(Cont'd)

served as a Supervisory Information Technology Specialist for a branch of the Navy, now referred to as NAVSISA (Naval Supply Information Systems Activity), in Mechanicsburg, Pennsylvania. He served in this capacity until January 2002, when he was transferred to a nonsupervisory position as a Project Officer. The circumstances surrounding that transfer represent the core of this action.

In his capacity as a Supervisory Information Specialist, Doe supervised a number of employees, including Ron Sivak, Julie Mock, Dave Brunner, and David Kramer. Shortly after these employees began working under Doe, they began filing workplace complaints and union grievances against him. Doe's superiors consistently supported him in his role as supervisor and determined that the allegations against him were baseless. Nevertheless, these employees continued to attempt to bait Doe into overreacting. For

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and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, *designate specific facts showing that there is a genuine issue for trial.*" 477 U.S. 317, 324 (1986) (internal quotation marks omitted) (emphasis added). Despite the clear language of the rule, the important purposes it serves, and the voluminous record in this case, Plaintiff has not submitted the requisite counter-statement. All facts included in Defendant's statement must therefore be deemed admitted. Nevertheless, the Court has engaged in an thorough, independent review of the record, and where certain facts are not included in the statement but are relevant to the case, the Court will supplement the factual background.

example, knowing that Doe was Jewish, Sivak told Doe that "[he did not] like working in this Auschwitz work environment;" posted a sign at his desk that read "Arbeit Macht Frei," referring to the infamous slogan posted at Nazi concentration camps; and after Doe asked him to take the sign down, Sivak replaced it with one featuring the same message, albeit in Cyrillic lettering (Doe Dep. 32-37; Doe Dep. Ex. 20, at 5.) Sivak also placed bullet-hole decals on his desk, which to Doe signaled a veiled threat of workplace violence. (*Id.*)

Still, Doe's supervisors supported him. On December 12, 2001, the NAVSISA management held a meeting with Doe to discuss the complaints and problems Doe was experiencing with his subordinate employees. At the meeting, Doe's supervisors discussed methods of addressing the problems, and even asked Doe for his input as to how to handle the situation. Ultimately, Doe suggested that he intended to confront the challenges in a professional manner, and agreed to use progressive-discipline policies to regain control over his subordinates.

Before that meeting took place, two anonymous "hotline call" complaints were lodged against Doe. The first call, placed with the Inspector General's office on September 26, 2001, included the following allegations:

> The caller stated that [Doe] sexually harassed an employee. [NAVSISA] removed his security clearance, but they reinstated him in 1999. Currently female employees have filed

> numerous sexual harassment complaints against [Doe]. In retaliation, [Doe] revoked the security clearances of three employees. He did not give a reason for his actions. Those employees, however, handle or have access to passwords of 3,000 base employees.

(Naber Dep. Ex. 3, Aug. 4, 2005.)

In the second call, placed with the entity directly above NAVSISA (the Naval Supply Systems Command) on November 5, 2001, the caller alleged that:

> Back in June, [Doe] assaulted a female employee and the Command has done totally nothing about it. There are people back there that are terrified to come in, they think he may have a gun. At times he just loses it, he rants and raves and screams and hollers — it's just unbelievable. Wish you people could do something because FMSO refuses to remove him.

(*Id.*)[3]

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3. The Court notes of these two hotline calls, only the second is a transcription. The first, lodged with the Inspector General's office, is a summary of the caller's allegations. In the briefs related to the instant motions, Doe places significant emphasis on the fact that the transcript included in the hotline-call report makes no reference to the revocation of Doe's security clearance. This apparent discrepancy lies at the foundation of

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Based on these hotline calls, and pursuant to established procedures, Dave Duckett (the Director of Command Evaluation for NAVSISA) conducted a personnel investigation into the allegations of the complaint. In the course of the investigation, Duckett determined that the majority of the allegations in the complaints were unsubstantiated. But during his investigation on the alleged revocation of Doe's security clearance, Duckett obtained copies of several documents. One of those documents, a letter dated August 2, 1991, indicated that Doe's clearance had been revoked on May 14, 1991. Another document, a letter dated May 12, 1993, stated that upon reconsideration of the decision to revoke his security clearance, Doe would be eligible for sensitive positions. The third document, a copy of Doe's Electronic Personnel Security Questionnaire (referred to as a SF-86 form) submitted by Doe in 1999 as part of a security-clearance application, contained an affirmation by Doe that his security clearance had never been revoked. Based on the discrepancy between the letters, which plainly stated that Doe's security clearance had been previously

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many of Doe's arguments. However, Doe's emphasis is misplaced. In a record covering thousands of pages, it is perhaps difficult to overlook the facts that: (1) the two hotline calls were lodged separately (with over a month between them) and (2) the report of first hotline call is not a verbatim transcript of the phone call. Unlike Doe, however, the Court does *not* infer from the report of the two hotline calls that "the caller had said absolutely nothing about Doe lying on his security clearance." (Doe's Br. in Opp'n 10.)

revoked, and the representations on Doe's SF-86 form, Duckett relayed his finding that Doe had potentially falsified his security-clearance application.

On January 11, 2002, the NAVSISA management met to discuss the revelations of Duckett's investigation into the hotline-call complaints. At that meeting, Doe's supervisors agreed that the investigation should be referred to the Department of Navy Central Adjudication Facility ("DON CAF"), to resolve any issues related to Doe's possible falsification of his SF-86 form. Additionally, Doe's supervisors agreed that plaintiff's security access should be temporarily suspended and that Doe should be transferred to another less security-sensitive position.[4]

Later that day, two of Doe's supervisors called Doe to inform him of the meeting and the substance of the hotline complaints' allegations, and to tell him that his security clearance was suspended until resolution by DON CAF of an investigation into whether he falsified his SF-86 form. Doe told them that he filled out the SF-86 form in accordance with the advice given to him by Jean Stanley, an employee at the Security Division of NAVSISA. Doe's supervisors indicated that the issue needed to be resolved by DON CAF.

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4. In his deposition, Doe's immediate supervisor Wayne Coyne indicated that the issue of Doe's security clearance "was taken very, very seriously, more serious than normal, I guess, at that time because it [was] so soon after 9/11." (Coyne Dep. 60.) However, Coyne was not present at the January 11, 2002, meeting.

Doe was thereafter transferred from his position as a supervisor to a nonsupervisory position as a Project Officer in the Navy/Marine Corps Internet ("NMCI") project.[5] In the new position, Doe performed his job very effectively. While Doe worked at NMCI, his previous position was filled. NAVSISA then reorganized, and Doe's former position ended up on an outsourcing list.

On March 25, 2002, Doe contacted the Agency's EEO office. The next day, Doe and his attorney met with an EEO counselor. Doe subsequently filed a formal EEO complaint alleging six counts of discrimination on the basis of age, religion, and retaliation. Two of the six counts related directly to Doe's permanent reassignment, two related to the security-clearance investigation, and the remaining two related to the actions of Doe's subordinate employees. Doe's retaliation claims focused on three of Doe's prior activities: (1) his opposition to an incident of same-sex sexual harassment occurring in 1987; (2) his filing of an EEO complaint in 1991 based upon discrimination on the basis of a perceived mental disability; and (3) his initiation of EEO processes in 1998 related to allegedly discriminatory failure to promote.

On July 8, 2002, DON CAF determined that Doe did not falsify his SF-86 form, and reinstated his security clearance. Shortly thereafter, Doe asked that his former second-level supervisor, Leonard Faerber, return him

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5. That position had the same pay grade and level, as well as promotion eligibility, but Doe believed it was a "dead end" job. (Doe Dep. 71.)

to his original supervisory position. Faerber told Doe that he could not reinstate him to his previous position, despite DON CAF's adjudication of the security-clearance issue in Doe's favor, because Doe's reassignment was permanent, and because he was making a good contribution to the NMCI project. At a meeting on July 12, 2002, Faerber recommended that Doe remain in NMCI.

On August 17, 2002, Doe amended his EEO complaint to include two additional counts of discrimination related to the decision not to return him to his former supervisory position. On October 8, 2002, Doe again amended his complaint to include an allegation that Defendant attempted to intimidate Doe into dropping his pending EEO complaint.

Meanwhile, Doe's resume had been referred for two promotions. Both positions were filled by other candidates, one of whom was Jewish. Doe was notified that he was not selected for promotion on August 16, 2002, and then on October 21, 2002. On November 25, 2002, Doe amended his EEO complaint to include counts related to his non-promotion.

The EEOC investigated Doe's claims. On February 13, 2004, Defendant moved to dismiss Doe's complaint without a hearing. In his response to Defendant's motion, Doe stated that: "Based on the investigation of [Doe's] EEO Complaint by Terry Calcutt and our own discovery taken in this Matter, [Doe] is willing to limit his Complaint to" four of his reprisal claims. (R. 224.)

Appendix D

On May 27, 2004 the Administrative Judge entered judgment in favor of the Defendant, but noted that "[Doe] limited his claim to reprisal discrimination based on the incidents discussed." (R. 226.) After his EEO complaint was dismissed, Doe agreed to take early retirement and received $25,000.

Doe thereafter brought this action.

B. Procedural Background

On September 29, 2004, Doe filed his complaint in this Court. (Doc. No. 1.) Defendant answered on December 29, 2004. (Doc. No. 5.) After extensive but contested discovery, the parties filed cross-motions: Defendant moved for summary judgment and Plaintiff moved for default judgment or a spoliation instruction. (Doc. Nos. 39, 41.) The parties briefed the motions. Doe then filed a motion for permission to supplement the record and to submit a supplemental brief, which the Court granted. (Doc. Nos. 81, 87.) Doe then moved for permission to continue using the pseudonym "John Doe." (Doc. No. 83). The parties briefed the motion. (Doc. Nos. 84, 85.) Finally, on February 6, 2007, Doe filed another motion to supplement the record. (Doc. No. 97), which the parties have fully briefed. (Doc. Nos. 98-100). The motions are ripe for disposition.

Appendix D

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 provides that summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986). When deciding a motion for summary judgment, the Court views the facts in the light most favorable to the nonmoving party, who is "entitled to every reasonable inference that can be drawn from the record." *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 788 (3d Cir. 2000). Summary judgment should be granted where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

With respect to the sufficiency of the nonmoving party's evidence, a court should grant summary judgment where the nonmovant's evidence is merely colorable, conclusory or speculative. *Anderson*, 477 U.S. at 249-50. There must be more than a scintilla of evidence supporting the nonmoving party and more than some metaphysical doubt as to the material facts. *Id.* at 252; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

III. DISCUSSION

Doe alleges employment discrimination on the basis of sex, religion, and retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-16, discrimination on the basis of age under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(1), and discrimination on the basis of a perceived mental disability under the Rehabilitation Act, 29 U.S.C. §§ 791, 794a.

Defendant argues that summary judgment should be entered on Doe's discrimination claims because he failed to exhaust his administrative remedies. Additionally, Defendant argues that summary judgment should be entered on Doe's reprisal claims because he has failed to state a prima facie claim. Finally, Defendant argues that Doe's Privacy Act claims should be dismissed as untimely. The Court will address these arguments in turn.

A. Doe's discrimination claims

Because Title VII is "the exclusive remedy for federal employees who allege discrimination in the workplace," *Robinson v. Dalton*, 107 F.3d 1018, 1020 (3d Cir. 1997), a plaintiff may not bring suit directly in federal court without exhausting her claims at the administrative level as required by 42 U.S.C. § 2000e-16(c). Congress requires that a plaintiff exhaust Title VII claims at the administrative level "to afford the EEOC the opportunity to settle disputes through

conference, conciliation, and persuasion, avoiding unnecessary action in court." *Antol v. Perry*, 82 F.3d 1291, 1296 (3d Cir. 1996). When a plaintiff fails to exhaust her claims, summary judgment in favor of a defendant is proper. *Atkinson v. LaFayette College*, 460 F.3d 447, 453 (3d Cir. 2006).

1. Doe did not exhaust his age and religious discrimination claims because he abandoned them at the administrative level[6]

When a plaintiff voluntarily withdraws a claim at the administrative level, the exhaustion requirements of Title VII are not met. As such, courts routinely hold that "[t]he voluntary withdrawal of discrimination charges during the EEO process constitutes a failure to exhaust such claims." *See, e.g., Torruellas v. Potter*, 2006 U.S. Dist. LEXIS 18736, at *6-7 (S.D.N.Y. Mar. 6, 2006); *see also Rivera v. United States Postal Serv.*, 830 F.2d 1037, 1039 (9th Cir. 1987) ("To withdraw is to abandon one's claim, to fail to exhaust one's remedies.").

At the administrative level, Doe alleged discrimination claims on the basis of age and religion, but then voluntarily withdrew them before the agency rendered its final decision. When Defendant moved to dismiss Doe's EEO complaint without a hearing, Doe

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6. The Court notes that Doe did not include allegations of religious discrimination in his federal complaint. However, both parties have proceeded as if Doe raised his religious discrimination claims.

opted to limit his Complaint to four of his retaliation claims. Accordingly, in her final decision, the Administrative Judge noted that "Complainant originally also claimed [Defendant] unlawfully discriminated against him on several occasions based on his religion (Jewish) and age (date of birth 7/15/47). However, in his April 12, 2004 response . . . Complainant limited his claim to reprisal discrimination based on the incidents discussed." (R. 226.) Thus, those claims were not exhausted, and may not be raised at the federal level. *Sharon v. Yellow Freight Sys.*, 872 F. Supp. 839, 846 (D. Kan. 1994) ("Plaintiff voluntarily withdrew his claim of religious discrimination from the EEOC investigation and it is therefore barred by his failure to exhaust administrative remedies."); *Sobel v. Eastman Kodak Co.*, No. 86-5391, 1987 U.S. Dist. LEXIS 6505, at *4-5 (E.D. Pa. July 16, 1987) ("plaintiff never exhausted his administrative remedies because he withdrew his charge with the EEOC before the agency passed on its merits or issued a right to sue letter").

Doe now argues that his abandonment of his age and religious discrimination claims should be excused. He advances several justifications for his failure to exhaust. First, Doe contends that his theories at the administrative level related to age and religious discrimination primarily focused on the Defendant's failure to reinstate him or promote him, whereas he is now primarily concerned with the Defendant's apparent desire to involuntarily transfer him to another position in order to placate Doe's anti-Semitic coworkers. This argument is unavailing as a factual matter. Doe's claims

abandoned at the EEO level are the same as those now advanced by him in this Court.

Second, Doe alleges that he should be permitted to proceed with his claims because Defendant "misled" him with regard to the substance of the hotline calls. However, as described above, Doe's belief that the hotline calls contained no reference to Doe's security clearance is simply unsupported by the facts. Furthermore, even if Doe were correct that the agency's investigation was somehow incomplete, a withdrawal of a claim constitutes abandonment nonetheless. *Torruellas*, 2006 U.S. Dist. LEXIS 18736, at *6-8 (rejecting plaintiff's argument that "withdrawal was made reluctantly on the realization that there was no meaningful record to consider regarding the allegations").

Finally, although the prudential exhaustion requirements of Title VII are tempered by equitable considerations, *cf. Robinson*, 107 F.3d at 1022 (allowing courts to equitably toll certain Title VII cases), it is important to note that Doe was represented by the same counsel that represents him in the instant matter. To the extent that Doe failed to exhaust his claims, any equitable considerations must be evaluated in light of the fact that Doe was represented throughout the administrative and judicial processes. And although some of the evidence presented to the Court is troubling, especially with regard to the behavior of Doe's coworkers, Doe has not advanced a sufficiently strong reason to excuse the voluntary withdrawal of his claims at the administrative level.

Therefore, the Court will dismiss Doe's age and religious discrimination claims because he failed to exhaust those claims.

2. Doe did not exhaust his perceived-mental-disability claim and such exhaustion is not excused in this case

Unlike Doe's age and religious claims, which Doe raised at the EEO level, Doe did not include a perceived-mental-disability claim in his formal EEOC complaint. Defendant accordingly argues that Doe cannot proceed on this claim because he failed to exhaust it. A plaintiff seeking relief against a federal employer for employment discrimination under the Rehabilitation Act must exhaust Title VII remedies before bringing suit. *Spence v. Straw*, 54 F.3d 196, 201 (3d Cir. 1995). But, the Third Circuit has held that in situations where "the acts alleged in the subsequent Title VII suit are *fairly within the scope* of the prior EEOC complaint, or the investigation arising therefrom," *Waiters v. Parsons*, 729 F.2d 233, 237 (3d Cir. 1984) (emphasis added), the Title VII exhaustion requirement is relaxed, *see also Wilson v. MVM, Inc.*, No. 05-3204, slip op. at 14-15 (3d Cir. Jan. 29, 2007) (holding that *Waiters* applies with respect to the prudential exhaustion requirements of the Rehabilitation Act).

In this case, Doe does not claim that the "the core grievances in the suit filed and the earlier EEOC complaint were the same," *Antol*, 82 F.3d at 1295, or that the disability claim is an "explanation[] of the

original charge," *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 399 (3d Cir. 1976). Nor does Doe proffer "evidence of any agency impropriety" in the course of the EEOC investigation, *Spindler v. SEPTA*, 47 F. App'x 92, 95 (3d Cir. 2002), or show that the EEOC's investigation was materially incomplete, *Robinson*, 107 F.3d at 1026. Rather, he asserts that "a reasonable investigation of [his] formal complaint would have explored the subject," (Doe's Br. in Opp'n 32) because the Navy was aware that he had previously undertaken a psychological evaluation in order to obtain a security clearance in 1990 and because his 1991 EEO complaint alleged discrimination on the basis of mental handicap. (*Id.*) The 850-page investigation report, however, did not reveal such a claim. Additionally, even though the EEO permitted Doe to amend his complaint to include additional claims on several occasions, he did not raise a claim of perceived-mental-disability discrimination. As such, Doe's disability-discrimination claims will be dismissed.[7]

3. Doe did not exhaust his constructive-discharge claim at the administrative level and such exhaustion is not excused in this case

In his federal complaint, Doe alleges that his retirement constituted a constructive discharge.

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7. Doe also alleged in his federal complaint that he was discriminated against on the basis of sex. However, Plaintiff did not charge sex discrimination in his formal EEO complaint, nor has he indicated that a reasonable investigation would have revealed a basis for such a claim.

Defendants argue that Doe failed to exhaust a constructive-discharge claim, as evidenced by the fact that Doe's retirement came *after* the EEOC granted summary judgment against him.

Doe readily admits that he did not exhaust his constructive-discharge claims. Instead, Doe cites this Court's opinion in *Kiburz v. England*, No. 04-2247, 2005 WL 2314152, at *4-6 (M.D. Pa. Sept. 21, 2005), for the proposition that exhaustion was not required because Doe's retaliation claims raised in the formal EEO complaint and his constructive-discharge claim are "based on the exact same set of facts," and involve the same "core grievance." (Doe's Br. in Opp'n 29-30.)

In *Kiburz*, the plaintiff filed a disability-discrimination complaint to the Merit System Protection Board ("MSPB") alleging that the defendant failed to accommodate his disability. After an ALJ denied his complaint, and during an appeal of the ALJ's decision, the plaintiff accepted early retirement. The plaintiff then filed a second complaint to the MSPB based on the same facts as the first complaint, but alleging that his retirement constituted a constructive discharge. The ALJ dismissed the second complaint because the appeal of the first complaint was still pending. In the order, the ALJ required that the plaintiff file a "notice of intent to refile" within fifteen days after the MSPB made a final decision on the appeal. When the MSPB denied the plaintiff's appeal, he filed a complaint in federal court alleging both failure-to-accommodate and constructive-discharge claims.

The defendant then moved to dismiss the plaintiff's constructive-discharge claim for a failure to exhaust. This Court then considered and rejected the defendant's argument that the Supreme Court's holding in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 (2002), effectively overruled the Third Circuit's holding in *Waiters* that exhaustion is not required for "acts alleged in the subsequent Title VII suit [that] are fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom." 729 F.2d at 237. Accordingly, this Court found that under *Waiters*, Kiburz's constructive-discharge claims did not need to be exhausted.

But the factual scenario presented in *Kiburz* differs from this case in an important way. In *Kiburz*, the constructive-discharge claim was raised *before* a final decision on the disability-discrimination claim had been rendered, and could fairly be considered within the scope of the prior MSPB investigation. In this case, *Waiters* does not save Doe's constructive-discharge claim, because the basis for his claim did not arise until *after* the EEOC had rendered its final decision. *Compare Crumpton v. Potter*, 305 F. Supp. 2d 465, 476 (E.D. Pa. 2004) (plaintiff did not exhaust a retaliation claim occurring six days after a final decision of the EEOC "[b]ecause Crumpton's denial of overtime . . . could not have been within the scope of the agency's investigation."); *see also Graham v. Gonzales*, No. 03-1951, 2005 WL 3276180, at *5 (D.D.C. Sept. 30, 2005) (refusing to excuse exhaustion of claims that were "the culmination of, and part of, [a] claim as to which [the plaintiff] did exhaust his administrative remedies.").

In *Kiburz*, this Court did not read *Waiters* to cover discriminatory acts that could not logically have been presented within the scope of a complaint, and will not do so now. Rather, *Waiters* continues to apply: when an "incident (1) falls within the scope of a prior EEOC complaint, or (2) falls within the scope of the EEOC investigation which arose out of it," *Robinson*, 107 F.3d at 1025, the technical requirements of exhaustion are relaxed.

Therefore, Doe's constructive-discharge claims will be dismissed.

B. Doe's Title VII retaliation claims

Defendant also seeks summary judgment as to Doe's retaliation claims. To state a prima facie Title VII retaliation claim, a plaintiff must proffer evidence to establish three separate elements: "(1) she engaged in activity protected by Title VII; (2) the employer took an adverse employment action against her; and (3) there was a causal connection between her participation in the protected activity and the adverse employment action." *Moore v. City of Philadelphia*, 461 F.3d 331, 340-41 (3d Cir. 2006) (quoting *Nelson v. Upsala Coll.*, 51 F.3d 383, 386 (3d Cir. 1995)). In this case, only the second and third elements are in dispute.

To prove the second element of a prima facie retaliation claim, a plaintiff must show that "a reasonable employee would have found the alleged retaliatory actions 'materially adverse' in that they 'well might have

dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Moore*, 461 F.3d at 341 (quoting *Burlington N. & Sante Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006)). In this case, Doe asserts that several employment actions taken against him were materially adverse. Specifically, Doe alleges that his temporary suspension from classified information, his involuntary lateral transfer, the decision not to reinstate him to his position, and his non-selection for promotion constitute materially adverse employment actions. Based on these allegations, the Court finds that a jury could conclude that a reasonable worker might have been dissuaded from engaging in protected activity. Therefore, Doe's claims meet the second element of a *prima facie* case.

Doe fares much worse under the third element, however. To show a causal connection, a plaintiff must be able to present evidence "sufficient to raise the inference that her protected activity was the likely reason for the adverse action." *Kachmar v. Sungard Data Sys.*, 109 F.3d 173, 177 (3d Cir. 1997) (quoting *Zanders v. National R.R. Passenger Corp.*, 898 F.2d 1127, 1135 (6th Cir. 1990)). When engaging in this inquiry, the Court must consider each case "with a careful eye to the specific facts and circumstances encountered." *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 n.5 (3d Cir. 2000).

Appendix D

1. Doe cannot show that a causal connection exists between his prior EEO activity and the decisions to involuntarily transfer him laterally

As an initial matter, the Court notes that more than three years elapsed from the time that Doe began an EEO pre-complaint process in 1998 and the decision to involuntarily transfer Doe to a nonsupervisory position in January 2002. Over ten years transpired from the date when Doe filed his first EEO complaint in 1991. Certainly, the span of time between a protected act and an adverse employment action is not conclusive as to the existence of a causal connection. *See Kachmar*, 109 F.3d at 178 ("By summarily concluding that there was too great a gap between Kachmar's protected acts and her termination, the district court failed to give Kachmar the opportunity to delve further into the facts by discovery."). Nevertheless, temporal proximity is a factor that a court should consider when determining whether plaintiff has met the burden to show a causal connection. *See. e.g., Robinson v. SEPTA*, 982 F.2d 892, 895 (3d Cir. 1993) (noting that on a "clearly erroneous" standard that, without intervening circumstances, the court "might be hard pressed" to find a causal connection with a two-year gap)[8]; *Brodetski v. Duffey*, 199 F.R.D. 14, 20 (D.D.C. 2001) ("Although courts have not established the

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8. In *Burlington Northern*, the Supreme Court rejected *Robinson* on other grounds. *See Moore*, 461 F.3d at 341 (discussing the Supreme Court's disagreement with the Third Circuit's approach with regard to the second element of a prima facie retaliation claim).

maximum time lapse between protected Title VII activity and alleged retaliatory actions for establishing a causal connection, courts generally have accepted time periods of a few days up to a few months and seldom have accepted time lapses outside of a year in length.").

Also critically important in this case is the fact that Defendant has proffered uncontroverted evidence that none of the individuals responsible for taking the adverse employment actions against Doe were aware of his prior EEO activity. SMF 139-52; *compare Iyer v. Everson*, 382 F. Supp. 2d 749, 758 (E.D. Pa. 2005) (finding no causal connection when unrebutted evidence showed that the decisionmaker had no knowledge of plaintiff's EEO complaints). Although Doe asserts by speculation that the filing of his EEO complaints was "common knowledge," the record clearly demonstrates that his supervisors were not aware of Doe's prior EEO activity. (*See, e.g.*, R. 98, 110, 128.) Without evidence of a causal connection between the protected activity and the adverse employment actions, Doe's retaliation claim related to his involuntary transfer cannot survive summary judgment.

2. Doe cannot show that the decisions not to reinstate him to his previous position or promote him was retaliatory

Doe also cannot show that a causal link existed between his formal EEO complaint filed in March 2002 and the decision not to return him to his former position after his security clearance was reinstated. The sworn affidavit and deposition testimony of Leonard Faerber, Doe's second-level supervisor, establishes that the decision not to return Doe to his former position was made solely by Faerber. (R. 56; Faerber's Dep. 71-77.) Faerber testified that he made his decision because "it was a non-starter to even broach the subject with the executive officer to have him move back. Even if I had doubt and had talked the [executive officer] into it, I don't think the [executive officer's] position with regard to future conflict with those employees was going to change." (Faerber's Dep. 73, ¶¶ 9-17.) Further, it is undisputed that Doe's reassignment was permanent, and Doe has proffered no evidence that otherwise allow a reasonable factfinder to "conclude anything other than that [Faerber] would have made exactly the same decision [not to reinstate Doe, even if] he had never filed an EEOC complaint." *Sarullo v. United States Postal Serv.*, 352 F.3d 789, 801 (3d Cir. 2003). Similarly, with respect to his failure-to-promote claims, Doe has proffered no evidence that the selection committee knew of his protected activities. Accordingly, Doe has not established a prima facie retaliation claim based on the decisions not to reinstate him to his former position or promote him.

D. Doe's Privacy Act claims

Doe alleges that Defendant violated his rights protected under the Privacy Act, 5 U.S.C. § 552a, by disclosing his security records to various unauthorized individuals. The Privacy Act prohibits unauthorized disclosure of certain records about an individual without consent, § 552a(b), and permits an aggrieved plaintiff to seek relief in a civil action when a violation occurs, § 552a(g)(1).[9] In order to bring an action to enforce these rights, the plaintiff must file a complaint within two years "from the date on which the cause of action arises," or from the date that a plaintiff discovers that an agency "materially and willfully misrepresented any information required . . . to be disclosed to an individual." § 552a(g)(5).[10] This two-year limitations period runs from

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9. The Court will assume, without deciding, that Doe could state a Privacy Act claim in this case. However, the Court notes that the disclosure prohibition is subject to several enumerated exceptions that might apply in this case, including disclosure to "officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties." § 552a(b)(1).

10. In an unpublished *per curiam* opinion, the Third Circuit stated that "[t]he statute of limitations is a jurisdictional prerequisite to filing suit under the Privacy Act." *Weber v. Henderson*, 33 F. App'x 610, 611 (3d Cir. 2002) (citing *Bowyer v. U.S. Dep't of the Air Force*, 875 F.2d 632, 635 (7th Cir. 1989)). In 1987, the Seventh Circuit held that "a plaintiff's failure to file suit within the [Privacy Act's two-year limitations period] deprives the federal courts of subject matter jurisdiction over (Cont'd)

the time "when the individual knows or has reason to know" of the alleged violation. *Green v. Westphal*, 94 F. App'x 902, 904 (3d Cir. 2004); *Tijerina v. Walters*, 821 F.2d 789, 798 (D.C. Cir. 1987).

In this case, Doe concedes that he knew as early as January 11, 2002, that the contents of his security records had been disclosed to certain individuals within the command structure.[11] (Doe's Dep. 28-29, 193-94;

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the action." *Diliberti v. United States*, 817 F.2d 1259, 1262 (7th Cir. 1987). Since *Diliberti*, several courts of appeals followed its holding that courts lack subject-matter jurisdiction over untimely Privacy Act claims. See *Hearrll v. Fleming*, 285 F.3d 1292 (10th Cir. 2002); *United States v. Lindert*, 142 F.3d 437 (Table) (6th Cir. 1998); *Doe v. NSA*, 165 F.3d 17 (Table) (4th Cir. 1998); *Akutowicz v. United States*, 859 F.2d 1122, 1126 (2d Cir. 1988); *Reyes v. Supervisor of Drug Enforcement Admin.*, 834 F.2d 1093, 1096 (1st Cir. 1987).

In 2003, in light of Supreme Court precedent in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990), the United States Court of Appeals for the District of Columbia Circuit rejected the view that the Privacy Act limitations period is jurisdictional. *Chung v. United States Dep't of Justice*, 333 F.3d 273, 278 n.* (D.C. Cir. 2003) (overruling *Griffin v. United States Parole Comm'n*, 192 F.3d 1081, 1082 (D.C. Cir. 1999)); *see also Harris v. F.A.A.*, 353 F.3d 1006, 1013 n.7 (D.C. Cir. 2004) (describing *Chung* as "express[ing] doubt about the jurisdictional nature" of the Privacy Act's limitations period). The Third Circuit has not expressed any opinion on the jurisdictional nature of Privacy Act's limitations period since *Chung*.

11. Doe testified in deposition that when his supervisors called him on January 11, 2002, he "[sat] there saying to myself,
(Cont'd)

Doe's Br. in Opp'n 8.) Yet Doe brought this action on September 29, 2004, more than two years later. Doe invokes the discovery rule and the equitable-tolling doctrine identified by the Third Circuit in *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1385 (3d Cir. 1994), to justify his claim's timing, arguing that he was not aware until after September 29, 2002, that the disclosure may have been implicated his Privacy Act rights.

Oshiver, relied on by both parties for opposite propositions, involved a gender-discrimination complaint filed under Title VII. Oshiver, an hourly associate attorney at the defendant firm, was dismissed from her position "with the explanation that the firm did not have sufficient work to sustain her position . . . but that the firm would contact her if either additional hourly work or [a full-time] associate position became available." *Id.* at 1384. During an unemployment benefits hearing over a year later, Oshiver learned that the defendants hired a male attorney to replace her shortly after her dismissal, and later hired a male full-time associate attorney. *Id.* Although she filed discriminatory discharge and discriminatory failure-to-hire claims with the Pennsylvania Human Relations Commission and the Equal Employment Opportunity Commission shortly after learning of defendant's actions,

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what the hell are they doing with my paperwork. And I didn't sleep at all that night, and it just went downhill from there. It just — It was really bad. The effect [it] had on me health wise physically —." (Doe Dep. 29.)

she did not file within 300 days of her dismissal as required under Title VII. The district court dismissed Oshiver's complaint for failure to timely exhaust her administrative remedies.

On appeal, the Third Circuit described two doctrines that operate to lengthen a limitations period: the discovery rule and "equitable tolling." The first of the two doctrines, the discovery rule, delays the accrual of a cause of action until a "potential claimant is either aware, or should be aware, of the existence of and source of an injury," *id.* at 1386, because the injurious effects of a legal wrong will in many cases not materialize until a later date. But once a claimant is made aware that he or she has been harmed, the limitations period begins to run irrespective of knowledge that the harm is legally actionable. *Id.* ("awareness of actual injury, as opposed to legal injury, is sufficient to trigger the running of the statutory period"). Thus, in Oshiver's case, the Third Circuit held that the discovery rule did *not* apply because the limitations period began running immediately as of her injury (her dismissal), even though she did not know that she had a legal cause of action until months later. In this case, the application of the discovery rule is straightforward; Doe admits that he was aware in January 2002 that the Defendant had disclosed his security records, which led to his removal of access to classified information and his reassignment to a non-supervisory position. That he did not realize that the disclosure could have supported a cause of action until much later is inapposite to the discovery rule.

Appendix D

The second doctrine recognized in *Oshiver*, equitable tolling, extends the limitations period by "stopping the clock" when the equities of a case require it.[12] Unlike the discovery rule, which begins the tolling period upon a plaintiff's awareness of injury (as opposed to the existence of a cause of action), equitable tolling "keys on a plaintiff's cognizance, or imputed cognizance, of the facts supporting the plaintiff's cause of action." *Id.* at 1390. The Third Circuit has recognized the availability of equitable tolling in at least three situations: "(1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum." *Id.* at 1387. In this case, none of these situations is applicable. There is no dispute (beyond Doe's speculation) that Defendant did not actively mislead Doe by representing that the disclosure of his security records was for any reason other than to follow-up on the hotline call. There are no extraordinary circumstances that barred Doe from bringing a Privacy

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12. The Court notes that if *Weber v. Henderson*, *supra* note 10, is correct that the Privacy Act's limitations period is jurisdictional, then equitable tolling would be unavailable in this case. As the Third Circuit has made clear, "[w]here the filing requirements are considered 'jurisdictional,' non-compliance bars an action regardless of the equities in a given case." *Oshiver*, 38 F.3d at 1387 (quoting *Hart v. J.T. Baker Chem. Co.*, 598 F.2d 829, 832 (3d Cir. 1979). The Court need not resolve this issue, however, because equitable tolling would not apply in this case.

Act claim, and when he brought it, he brought it in the correct forum.[13] Doe has not — in his complaint or through proffered evidence — provided sufficient support for the application of the equitable tolling doctrine.

Accordingly, Doe's Privacy Act claim is untimely, and will be dismissed.

IV. DOE'S MOTIONS

Although the Court will grant Defendant's motion for summary judgment, three outstanding motions filed by Plaintiff require some discussion. Plaintiff has filed a motion for default judgment or spoliation instruction (Doc. No. 39), a motion to re-open the record (Doc. No. 97), and a motion to continue proceeding pseudonymously (Doc. No. 83). The Court will address each in turn.

In his spoliation motion (Doc. No. 39), Doe asks this Court to "deny any dispositive motion that the Defendant files," "give an instruction on the spoilation [sic] inference," or enter default judgment against Defendant. (Doc. No. 40, at 25.) He requests these sanctions because he believes that Defendant has deliberately attempted to thwart discovery by destroying evidence and otherwise has frustrated his "attempt to seek and obtain evidence." (Doc. No. 40, at

13. The Court also notes that Doe was represented by counsel during most of the limitations period.

23.) The crux of Doe's motion is that the Navy withheld or destroyed emails during discovery.

Defendant responds that "Plaintiff is correct that he did not receive any materials related to those matters because when plaintiff asked for them during discovery, the Navy objected to their production on grounds of relevancy (and burdensomeness)." (Doc. No. 67, at 6.) Nonetheless, Doe contends "it appears as if some documents were destroyed simply because no one ever told people that because of Mr. Doe's EEO complaints, relevant documents should be retained until the litigation was resolved." (Doc. No. 72, at 18.) This contention fails because Defendant has established that "the back-up tapes of e-mails were *not* destroyed but, rather, were retained" (Doc. No. 67, at 8) (emphasis in original), and ultimately produced. Upon these considerations, the Court finds that Defendant did not destroy or otherwise improperly thwart the discovery of relevant evidence.

Even if Doe's claims had merit, the onerous sanction of default judgment or a spoliation instruction would be inappropriate. The Third Circuit has established a three-factor test when considering the degree of sanctions appropriate for spoliation:

> (1) [T]he degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness

> to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.

Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 79 (3d Cir. 1994). Weighing these factors, it is clear that sanctions are not justified. Doe has not shown that Defendant intended to destroy or alter any evidence. Nor is it the case that the merits of Doe's case would be adversely affected by such evidence, particularly because Doe abandoned many of his claims at the EEO level. In terms of the degree of appropriate sanction, Doe asks this Court to punish the Navy to "set an example." (Doc. No. 40, at 25.) Finding that his allegations of wrongdoing by Defendant lack merit, the Court will deny the motion.

On February 6, 2007, Doe moved to re-open the record and further depose Captain Naber based upon evidence produced by Defendant after discovery had closed. (Doc. No. 97.) Included in the newly produced evidence were calendar entries of Captain Naber that included notes pertaining to the events surrounding the revocation of Doe's security clearance and transfer. In particular, Doe states that "a reasonable jury reading the comments . . . could reasonably find that the Navy had a personnel problem between an anti-Semitic employee and his Jewish supervisor, which the Navy chose to resolve by moving the Jewish supervisor through misuse of security regulations instead of disciplining or removing the offending anti-Semitic employee." (Doc. No. 98, at 7-8.) However, even if a

further deposition would shed light or provide support for Doe's religious discrimination claims, it would not affect the disposition of this case; even with the additional evidence, Defendant would be entitled to summary judgment because Doe abandoned his religious discrimination claims at the administrative level, and therefore failed to exhaust his administrative remedies. As such, the Court will deny the motion to re-open the record as moot.

Finally, because judgment will be granted in Defendant's favor, Doe's motion to continue pseudonymously (Doc. No. 83) will be denied as moot.

V. CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment will be granted, and Plaintiff's remaining motions will be denied. An appropriate order follows.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING FILED FEBRUARY 17, 2009

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-3481

MARSHALL J. KATZ,

Appellant

vs.

DONALD C. WINTER, SECRETARY
UNITED STATES NAVY

BEFORE: SCIRICA, *Chief Judge,* SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, WEIS* and Van ANTWERPEN,*
CIRCUIT JUDGES

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *ENBANC*

The petition for rehearing filed by Petition having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who

* As to Panel Rehearing Only

concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc,* the petition for rehearing is DENIED.

BY THE COURT:

s/ Weis
United States Circuit Judge

DATED: February 17, 2009